SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

PETITIONERS' REPLY BRIEF

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of Counsel.

INDEX

	PAGE
I. The two-court rule	2
II. The position of the National Mediation Board	4
III. The conditions under which American and Allied consummated their agreement	5
IV. Jurisdiction to deal with the issues raised by the complaint is not reserved exclusively to the Mediation Board	6
V. The relief sought	8
VI. The Norris-LaGuardia Act is not applicable to the issues raised in this dispute	8
VII. The petition has been timely filed	9
Conclusion	10

Table of Authorities

CASES:

Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co., 353 U. S. 30 (1957)	8
Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768 (1952)	8
General Committee v. M. K. T. R. Co., 320 U. S. 323 (1943)	6
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271 (1949)	2
NLRB v. International Union, Progressive Mine Workers of America (not yet officially reported) (No. 597; decided January 6, 1964)	8
NLRB v. Kearney & Trecker Corp., 237 F. 2d 416	9
NLRB v. Superior Fireproof Door & Sash Co., 289 F. 2d 713	7
System Federation No. 40 v. Virginian Railway Co., 300 U. S. 515 (1937)	6, 7, 8
United States v Appalachian Electric Power Co., 311 U. S. 377 (1940)	2

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Preliminary Statement

This brief is submitted, pursuant to Rule 24(4) of the Rules of this Court, in reply to the briefs of the Respondent (hereinafter referred to as American) and the Additional Respondents (hereinafter referred to as Allied) which have been filed in opposition to the Petition for a Writ of Certiorari herein.

POINT I

The two-court rule.

The issues in dispute before this Court are issues of law. As to the facts, the substantial dispute is not as to what they are, but rather as to what meanings shall be drawn from them. The "two-court rule" referred to by the Respondents, limited as it is to findings of fact, and wholly inapplicable to conclusions of law (*Gracer Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271 (1949)), accordingly does not advance the determination of this matter.

American, at pages 9 and 10 of its brief, suggests that this Court give conclusive effect to the following conclusions of the District Court:

> "Concerning American's good faith, 'consideration of all the evidence * * * leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees' 'the Company never suggested that its pilots leave ALPA * * *' 'there is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave ALPA * * *' 'American displayed no interest in whether its employees left ALPA or not, certainly made no promise conditioned on their leaving ALPA or to induce them to leave ALPA, and at all times was willing to make agreements with ALPA if its own employees so desired' (District Court opinion, 51a, 53a, 68a, 78a)."

Regarding such conclusions, which represent not findings of fact but rather the application of rules of law to findings of fact, this Court, in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940) stated:

> "* * * The district court's finding that the New River was not navigable was concurred in by the

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> "* * * The district court's finding that the New River was not navigable was concurred in by the

circuit court of appeals after a careful appraisal of the evidence in the record. **Both courts stated in detail** the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. There is no real disagreement between the parties here concerning these physical and historical evidentiary facts. But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the ultimate conclusion upon navigability to be drawn from this uncontroverted evidence. The respondent relies upon this Court's statement that 'each determination as to navigability must stand on its own facts,' and upon the conventional rule, that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown. In cases involving the navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by **two courts to determine for itself whether the courts** have correctly applied to the facts found the proper legal tests. When we deal with issues such as those before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide."

* * *

"* * * Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." (311 U. S. at 403-04)

Finally, undisputed facts before the Courts below, to which neither the Respondents nor the Courts below have made reference, can nevertheless be properly brought to the attention of this Court. These are the facts which have been characterized by the additional Respondents, at pages 3 and 7 of their brief, as "* * * totally at odds with the findings of the District Court and the decision and opinion of the Circuit Court * * * "and founded upon "* * * isolated and distorted portions of the record * * *."

One such fact is the undisputed statement by Thomas H. Tracy, the Associate Executive Secretary of the National Mediation Board, in an affidavit submitted in the District of Columbia action dated June 24, 1963. In that affidavit, Mr. Tracy explained the Board's refusal to take cognizance of and deal with the issues raised by the complaint in this action, stating:

> "'It has been the consistent position of the National Mediation Board since its creation under the 1934 amendments to the Railway Labor Act, that this Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with the representation of carrier employees, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier.'"

Though no reference is made by Respondents or by the Courts below to this description by the Board of its function, it is obviously material and significant.

POINT II

The position of the National Mediation Board.

At page 2 of its brief *amicus curiae* to this Court, the Mediation Board has stated that

> "The petitioner's charges of company interference with the pilots' rights to organize were studied and considered by the Board. After investigation, the Board concluded, in early June, that a representation election by secret ballot should be held and that there was no merit to the charges of interference and coercion by the carrier".

Such a statement is plainly in conflict with its previous statement in the Tracy affidavit (quoted above) that it has no legal authority to deal with issues of coercion and interference such as those raised by the complaint herein. More-

over, by such a statement, the Board must necessarily disown its statement to the Court in the District of Columbia action that

> "The Board of course, takes no position on the merits of the New York litigation" (see Petition at p. 11).

If both the Courts below and the Mediation Board were correct when each found itself without jurisdiction to deal with such matters, then such violations of the Railway Labor Act have fallen into a jurisdictional void.

POINT III

The conditions under which American and Allied consummated their agreement.

As of July 9, 1963, the date on which American and Allied consummated their Agreement,

> (1) the pending election sought by Allied, in which Allied and ALPA were on the ballot as contending representatives, had not yet been held (and that election *was* held only after American and Allied had concluded and implemented their agreement); and
>
> (2) no decision had yet been reached in this action by the District Court; and
>
> (3) no decision had yet been reached by the District Court on American's motion for the appointment of a special master to determine whether American's pilots wished to be represented for collective bargaining by the O'Connell Committee.

Under such circumstances, the consummation of the July 9 agreement between the Respondents constitutes interference, coercion and assistance, as a matter of law. See decisions cited at pages 46-47 of Petition for a Writ of Certiorari.

Allied's statement at page 41 of its brief that it was not recognized by American as the pilots representative until July 9, the date of execution of the agreement, is in error. American dealt with the additional respondents as the pilots' bargaining representative continuously after mid-January, 1963; Allied is plainly the instrumentality of the additional respondents (see discussion at pages 61-62 of Petition for a Writ of Certiorari).

POINT IV

Jurisdiction to deal with the issues raised by the complaint is not reserved exclusively to the Mediation Board.

In the view of Petitioner, *System Federation No. 40* v. *Virginian Railway Co.*, 300 U. S. 515 (1937) and similar decisions establish the jurisdiction of the federal courts to deal with the issues raised by the complaint in this action. Respondents, on the other hand, contend (and the courts below found) that *General Committee* v. *M. K. T. R. Co.*, 320 U. S. 323 (1943) requires such issues to be reserved to the exclusive jurisdiction of the Mediation Board. At page 33 of its brief, Allied argues:

> "* * * The difference between the Virginian Railway case and the M-K-T Railway case, supra, pp. 28-29, is that in the latter (as here) a question of representation existed, and that question can only be resolved by the employees themselves under the procedures of the Railway Labor Act, as supervised by the National Mediation Board. However, when no question of representation exists, as in the Virginian Railway case where the carrier refused to deal with the certified union directly after it was certified [see decision of District Court of Virginian Ry. Co. v. System Federation No. 40, 11 F. Supp. 621, 627 (E. D. Va. 1935)] the courts may remedy the violation since there is no risk of conflict with

> the decisions of the Board or with the real wishes of the employees,"

Allied's argument, reduced to its simplest form, is that only a *certified* union is entitled to relief in the federal courts under the *Virginian Railway* principle, and that ALPA, which from 1939 to 1963 was the *recognized but not certified* representative of American's pilots, may apply only to the Mediation Board under the *M. K. T.* decision for relief from interference, assistance and coercion.* Thus, although the certified union in the *Virginian Railway* case was unquestionably and conclusively deemed to be the representative of the majority of the employees there involved, ALPA, a labor organization which, in January 1963, was the undisputed, recognized and incumbent bargaining representative is not, Respondents argue, entitled to similar treatment.

Respondents' argument is not supported by the Second Circuit Court of Appeals, however. In *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2nd 71., 725 (2d Cir. 1961), that Court ruled that a distinction between certification and recognition for such purposes lacks legal significance. Similarly, the Mediation Board agrees that under such circumstances, voluntary recognition should be given the same effect as certification. See Petition for a Writ of Certiorari at page 34.

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* There is substantial doubt whether, under such circumstances, the complaining union could invoke the processes of the Mediation Board if the violations have achieved their unlawful objective. It is also doubtful that the Board could provide adequate or curative remedies for such violations. See Petition for a Writ of Certiorari at pages 38, 39, 42.

POINT V

The relief sought.

With relation to the relief sought in this action, Petitioner respectfully refers to the decision of this Court dated January 6, 1964 in *National Labor Relations Board* v. *International Union, Progressive Mine Workers of America*, No. 597 (not yet officially reported).

POINT VI

The Norris-LaGuardia Act is not applicable to the issues raised in this dispute.

The provisions of the Norris-LaGuardia Act cannot be utilized to prevent the enforcement of positive mandates of the Railway Labor Act. The injunctive relief sought in the complaint would, if granted, provide a remedy for interference, assistance and coercion in violation of the Railway Labor Act. Under such circumstances, the earlier and more general provisions of the Norris-LaGuardia Act must, this Court has held, be accomodated to the positive mandates of the Railway Labor Act.

Brotherhood of Railroad Trainmen v. *Chicago River and Indiana R. Co.*, 353 U. S. 30 (1957);
Brotherhood of Railroad Trainmen v. *Howard*, 343 U. S. 768 (1952);
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American's argument that the refusal of arbitration precludes a grant of the relief sought by ALPA is misleading. The proffer of arbitration to which American makes reference encompassed economic matters, and not issues of interference, coercion and assistance, which form the basis of this action, and which did not come into being until long after arbitration had been proffered.

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POINT VII

The petition has been timely filed.

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Second Circuit on September 16, 1963. On November 7, 1963, 52 days later, petitioner filed its printed petition with this Court, together with certified copies of the appendices filed by all parties below, and the proceedings in the Court below. That filing complied with Rule 21(1) and (3) of the Rules of this Court. The petition was therefore timely filed.

Respondents now argue that the *entire record* before the Court below, in addition to the documents required by Rule 21(3) should have been filed in this Court prior to the expiration of 90 days from the entry of the judgment sought to be reviewed.* But with respect to the entire record, the final sentence of Rule 21(3) states:

> "In such cases, the petitioner *may*, at the time of filing his petition (or, if the petition for writ of certiorari is granted, then or before the time that his designation of portions of the record to be printed is due under paragraph 1 of Rule 26), file the entire record in addition to the appendix or appendices" (emphasis supplied).

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* Respondent, American, in Appendix D to its Brief, also refers to errors or omissions in the Petition. The page reference to the quotation found at page 18 of the Petition, which is discussed in the second paragraph of Appendix D, was inadvertently listed as "P. App. 88 a". That quotation is found instead at page 84 of Petitioners' Appendix. However, American's reference in the fifth paragraph of Appendix D to the citation to *NLRB* v. *Kearney & Trecker Corp.*, is erroneous; the correct citation to that decision is 237 F. 2d 416. The first portion of Appendix D is argumentative and does not require further discussion.

A consideration of the substantial issues raised by the Petition ought not to be confused or otherwise affected by a tabulation of the typographical errors in the respective briefs of the parties.

Notwithstanding that the timeliness of the petition is unaffected by the date of filing of the entire record before the Court below, Petitioner undertook to accomodate Respondent's requests.

Accordingly, on November 27, 1963, Petitioner moved the Second Circuit Court of Appeals for an order releasing the entire record (a matter of some 5700 pages of testimony, exhibits and other documents) for transmission to this Court. The Court did not release the record, however, presumably because of other matters *sub judice* and not involving Petitioner.

Petitioner next assembled duplicate copies of the entire record, to the extent that copies were available, and on December 13, 1963, it submitted these duplicates to the Clerk of the Court of Appeals with a request that the same be certified for transmission to this Court.

The clerk has not yet completed the certification of these numerous documents. When Petitioner is advised that certification is completed, the record will promptly be forwarded to this Court.

CONCLUSION

A writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Petitioners.

HENRY WEISS,
HERBERT A. LEVY,
of Counsel.